PP

v.

HAIRUL DIN ZAINAL ABIDIN

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-46-2000]
31 MAY 2001

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Discrepancies in weight of drugs - Whether amounts to failure of prosecution to prove weight of drugs*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Element of possession to be established - Meaning of possession - Whether passive possession sufficient to presume trafficking - Dangerous Drugs Act 1952, ss 2, 37(d), (da)*

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Factors to be taken into consideration - Whether age and marital status sufficient factors*

EVIDENCE: *Presumption - Presumption of trafficking - Element of possession to be established - Whether knowledge of possession may be presumed - Dangerous Drugs Act 1952, ss 37(d), (da)*

The accused was charged with trafficking in drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). According to the facts adduced by the prosecution, on 16 June 2000, one Inspector Yap (PW4) led a team of eight police officers in conducting an arrest operation at a certain premises ("the premises"). The accused person was walking towards the lift of the premises when one of the police officers identified himself as "police". The accused person attempted to escape but was unsuccessful. One Detective Lance Corporal Lim (PW3) then took possession of a white bag (P5) that the accused was holding. The white bag contained cannabis.

The accused person and the exhibits were handed over to one Chief Inspector Zainozin (PW2), the investigating officer. The exhibits were sent to the chemist for analysis and a copy of the chemist report (P16) was served on the accused on 21 February 2001.

At the close of the prosecution's case, counsel for the accused submitted that the prosecution had not made out a *prima facie* case on the basis that (a) the prosecution had failed to prove the weight of the dangerous drugs, in that the

weight of the dangerous drugs as found by PW2 was different from that stated in the chemist report; and (b) that in the case of trafficking, as in this case, knowledge of possession of the dangerous drugs must be proved by direct evidence without resort to presumptions.

Held:

[1] It was explained that PW2 had weighed the dangerous drugs together with the masking tape whereas the weight referred to in exh. P16 was 'berat bersih'. In any event the evidence clearly established that the whole of the dangerous drugs that he received was sent to the chemist for analysis. This fact made the difference in weight an irrelevant consideration.

[2] The definition of 'trafficking' in s. 2 of the DDA goes beyond mere passive possession. However the opening words of s. 2 '…unless the context otherwise requires' show that the definition provided is qualified. Thus where the context of a particular section in the Act appears to have intended a meaning different from that assigned by the definition the meaning given by s. 2 of the DDA will not be applicable. For instance under s. 37(da) of the DDA, proof of possession is sufficient to constitute trafficking without the need to prove any further act.

[2a] Therefore in order to prove the offence against the accused the prosecution must establish that the conduct of the accused falls within one of the acts defined in s. 2 of the DDA which involve the constituent element of possession. The offence may be proved by direct evidence or with the aid of presumptions. Where the possession is passive in the sense that it does not involve any of the acts specified in the definition of 'trafficking' in s. 2 of the DDA so as to amount to 'trafficking; as defined, the prosecution may rely on the presumption contained in s. 37(da) of the DDA to elevate such possession to 'trafficking' subject to proof of the requirement of the weight of the drugs concerned as specified therein. It must be noted however that it is not permissible to pile the presumption of trafficking under s. 37(da) upon the presumption of possession under s. 37(d) of the DDA.

[3] The evidence adduced showed that when the accused was arrested he was holding P5. The act of holding the dangerous drugs must either be an act which goes beyond passive possession so as to constitute an additional act of trafficking under s. 2 of the DDA or it must fall within the meaning of 'carrying' or 'keeping' as specified in the section.

[3a] Based on the facts, there was no evidence to show that the accused was holding P5 for a period of time in which event he can be said to be keeping it. The available evidence only shows that the accused was holding P5. He was therefore merely in passive possession of it. However in order to establish possession the prosecution must also establish that the accused knew what he was carrying. If the prosecution had adduced evidence to show that he was holding P5 for a considerable period of time then that fact coupled with the attempt to escape may support the inference that he had knowledge of the contents of the exhibits.

[3b] In the circumstances as the accused was merely in passive possession of the drugs, the prosecution must therefore rely on the presumption contained in s. 37(d) of the DDA to establish that the accused knew that he was in possession of the dangerous drugs. The prosecution could not avail itself of the further presumption contained in s. 37(da) of the DDA to presume that the accused was trafficking in the dangerous drugs. The charge therefore was amended to that of possession of dangerous drugs where the accused was found guilty of such offence.

[4] Any sentence to be passed must be a balance between the public interest to be served and the interests of the person to be sentenced. The seriousness of the drugs menace must therefore be reflected in the sentence to be passed so that the requirements of public interest can be served effectively. At the same time, it must be realised that the proper sentence for each drug offence depends on its own peculiar circumstances. The weight of the drugs plays a significant role in assessing the appropriate sentence.

[4a] The plea of mitigation of the accused consisted of a mere statement of his age and marital status. He did not give evidence so as to enable this court to ascertain the role he played in being found in possession of the dangerous drugs. Furthermore the weight of the drugs involved did not support the inference that he kept them for his own consumption.

[Accused convicted and sentenced to ten years' imprisonment and ten strokes of the rotan.]

Case(s) referred to:
Ang Chai Seng v. PP [2000] 1 CLJ 123 ***(cit)***
Bhagat Bahadur v. State [1996] Cri LJ 2201 ***(cit)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 ***(refd)***
Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(cit)***

Muhammad Hassan v. PP [1998] 2 CLJ 170 ***(foll)***
PP v. Chia Leong Foo [2000] 6 MLJ 705 ***(foll)***
PP v. Letchumanan [2000] 4 CLJ 685 ***(cit)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(cit)***
PP v. Tia Ah Leng [2000] 5 MLJ 401 ***(refd)***
R v. Kelly [1992] 92 DLR (4th) 643 (SCC) ***(refd)***
Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(cit)***
Tong Peng Hong v. PP [1955] MLJ 232 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da), 39A(2), B(1)(a), (2)

Other source(s) referred to:
Websters' New World Dictionary, 3rd edn

For the prosecution - Azhar Abdul Hamid, DPP
For the accused - Gobind Singh Deo; M/s Karpal Singh & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The accused in this case was charged with trafficking in 953.2 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the Act.

On 16 June 2000 Chief Inspector Yap Huat Tian (PW4) led a team of eight police officers, which included detective Lance Corporal Lim Hee Jiang (PW3) and Corporal Romli, to premises number Block 4, Desa Tun Razak, Sungei Besi, Kuala Lumpur ("the premises") to conduct an arrest operation. PW3 and Corporal Romli were directed to be at the ground floor of the premises to conduct surveillance duty. PW4 was at a higher floor for the same purpose. He and PW3 communicated with each other with the aid of a walkie talkie. At about 11.15 p.m. PW4 instructed PW3 to arrest a male Malay who was walking towards the lift. He then came down immediately by using the lift. When he came down PW3 and Corporal Romli had already arrested the male Malay who is the accused. PW3 said that the accused attempted to escape upon Corporal Romli identifying himself as "police" but was not successful. When the accused was arrested PW3 took possession of a white plastic bag with the word "starmart" (exh. P5) which he was holding. PW3 then handed exh. P5, which had some contents, to PW4 who opened it. It contained a

packet wrapped in old newspaper. PW4 unwrapped the packet and found it to contain a granular substance wrapped with masking tape. Upon tearing open the tape he found the granular substance to be plant material which he suspected to be cannabis. The accused and the exhibits were then handed over to Chief Inspector Zainozin bin Ishak (PW2), the investigating officer. On 19 June 2000 PW2 sent the exhibits to the chemist for analysis. On 14 July 2000 he received back the exhibits together with a report (exh. P16) the material part of which reads as follows:

> Saya telah memeriksa kotak bertanda 'Z' dan mendapati di dalamnya satu bungkusan plastik dibalut dengan pita pelekat bertanda 'A2' mengandungi 953.2 gram (berat bersih) satu bongkal bahan tumbuhan termampat. Setelah dianalisis, saya dapati bahan tumbuhan tersebut adalah 'cannabis'.

Upon being referred to exh. P16 in his cross-examination PW2 said:

> Saya ada timbang barang kes itu. Jumlah berat yang saya timbang adalah berbeza dengan berat di laporan kimia.

In his re-examination on this issue PW2 said,

> Saya timbang masking tape yang berisi ketulan mampat.

PW2 served a copy of exh. P16 on the accused on 21 February 2001.

At the close of the case for the prosecution learned counsel for the accused submitted that the prosecution had not made out a *prima facie* case. His submission was based essentially on two grounds, that is to say,

(i) the prosecution has failed to prove the weight of the dangerous drugs, and

(ii) in a case of trafficking, as in this case, knowledge of possession of the dangerous drugs must be proved by direct evidence without resort to presumptions.

With regard to the first objection raised by learned counsel it was his contention that the weight of the dangerous drugs as found by PW2 was different from that stated in the chemist report. He said that this means the evidence advanced by the prosecution in relation to the weight of the dangerous drugs is contradictory and unsatisfactory and as such ought to be rejected. This submission is answered by the evidence of PW2 who having said that there was a difference in the weight of the dangerous drugs as weighed by him and as stated in exh. P16 said in re-examination that he weighed the dangerous drugs together with the masking tape. It must, however,

be observed that the weight referred to in exh. P16 is the "berat bersih." That explains the difference in the weight of the dangerous drugs as weighed by PW2 and the chemist. Surely the nett weight of the dangerous drugs must be different compared to its weight when weighed with the masking tape. It follows that the difference in weight must be due to the weighing of the exhibit by PW2 together with the masking tape. In any event the evidence of PW2 clearly establishes that the whole of the dangerous drugs that he received was sent to the chemist for analysis. He was not cross-examined in any way on this issue. What therefore PW2 and the chemist weighed was the whole of the dangerous drugs seized. The fact that the whole of the dangerous drugs received was sent to the chemist for analysis makes the difference in weight an irrelevant consideration.

With regard to the second objection learned counsel first referred to the definition of "trafficking" in s. 2 of the Act which reads as follows:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

He then said that this definition does not include mere passive possession of dangerous drugs. It refers to an additional "act" beyond that of being in mere passive possession. In this regard he expressed agreement with my judgment in *PP v. Chia Leong Foo* [2000] 6 MLJ 705. He then said,

> Thus, in order to call for conviction upon a charge of trafficking, the prosecution must prove possession (which is knowledge, custody and/or control) and the additional act as set out in Section 2 of the Act making the offence more than mere possession and one of trafficking as set out in Section 2. It is submitted that this is the context in which Section 2 of the Act was promulgated namely that it is only upon proof of actual possession that Section 2 of the Act comes into operation. In other words, if the prosecution cannot prove by direct evidence the elements of knowledge, custody and/or control of the drug on part of the accused, then Section 2 cannot be involved and the prosecution fails to prove a case of trafficking. But merely showing possession is not enough. There must be some active 'act' on part of the accused which justifies conviction on a charge of trafficking and these acts are set out in Section 2 of the Act.

He then submitted, having referred to the judgment of Thomson J (as he then was) in *Tong Peng Hong v. PP* [1955] MLJ 232, that the presumptions contained in s. 37 of the Act, being statutory directions as to the drawing of

inferences, " … is not proof of actual possession but instead proof of facts from which it is said the accused is deemed to be in possession." He then referred to s. 37(d) of the Act and said:

> Clearly, section 37(d) involves a context of its own and cannot be read with section 2 of the DDA 1952. This is because section 2 of the Act speaks about 'acts' in relation to dangerous drugs and not 'anything whatsoever containing' dangerous drugs and it does not place any onus on part of the accused to rebut a presumption.
>
> Can therefore one use section 37(d) of the Act to prove possession and then move on to argue that section 2 applies in order to make it trafficking?
>
> I submit, with respect this cannot be done. Firstly, where reliance is placed on section 37(d) of the DDA 1952, the force of compelling presumptions would require the court to move into a different context as adhered to hereinbefore. As such, section 2 ceases to have effect. Section 2 states 'unless the context otherwise requires' and section 37(d) is a context which most certainly 'otherwise requires'.

He then referred to the case of *Chow Kok Keong v. PP* [1998] 2 CLJ 469 and continued:

> It is clear therefore that once the prosecution relies on inferences, the sort of which is covered by section 37(d) of the DDA 1952, the question of reading it together or calling for support from the provisions of section 2 does not arise. As such, the argument goes, that section 2 is applicable only where there is proof by direct evidence of knowledge, control and custody of the drug in question, which amounts to actual possession, coupled with proof of an additional act as set out in section 2 of the Act. Where there is no direct evidence of knowledge then the accused is at most deemed to be in possession of the drugs, by reason of which section 2 ceases to have effect.

The substratum of the argument of learned counsel is that the definition of "trafficking" in s. 2 of the Act requires proof of the ingredients by direct evidence without the aid of presumptions. I consider it necessary to answer the submission of learned counsel by first referring to *PP v. Chia Leong Foo* [2000] 6 MLJ 705 where I said at pp. 717 - 718:

> It must be observed that most of the acts that constitute 'trafficking' as defined in s. 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by *Pendakwa Raya v. Mansor Mohd Rashid & Anor* [1996] 3 MLJ 560. It follows that a person cannot keep,

conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. Proof of further facts to establish any one of these acts is therefore sufficient to make out a case of trafficking. Thus it is true, as the (then) Supreme Court observed in *Teh Geok Hock v. PP* [1989] 3 MLJ 162, that ' … the definition in the Act sounds artificial and not according to the ordinary meaning of the word "trafficking" which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication' (at p 163). The offence is therefore complete upon proof of the relevant act that constitutes 'trafficking' as defined in s. 2 of the Act and the purpose of such act is not material. The weight of the dangerous drugs involved is not a determinative factor (see *Leong Siew Hoong v. PP* [1988] 1 MLJ 396). Personal consumption may be set up to explain the possession of the drugs (see *Cohen Lorraine Philis & Anor v. PP* [1989] 3 MLJ 289; *Ng Chai Kem v. PP* [1994] 2 MLJ 210; *Chow Kok Keong v. PP* [1998] 2 MLJ 237). However, as a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64). Be that as it may, even though the definition of 'trafficking' contemplates acts that go beyond mere or passive possession of dangerous drugs such possession can be presumed to amount to trafficking if the amount of drugs possessed exceed a certain amount in weight dependent on the nature of the drugs involved as provided by s. 37(da) of the Act. Even in the absence of this presumption where a person is caught with being in possession of dangerous drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he intended to traffic in them would, in the absence of any plausible explanation by him, be irresistible (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64).

It will thus be observed that the definition of "trafficking" in s. 2 of the Act goes beyond mere passive possession. Be that as it may, the opening words of s. 2 of the Act show that the definition provided is qualified. The words are:

In this Act, unless the context otherwise requires.

These words mean that the definition is only intended to apply where the context is not otherwise (see *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29). Thus where the context of a particular section in the Act appears to have intended a meaning different from that assigned by the definition, the meaning given by s. 2 of the Act will not be applicable (see *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132). The word "trafficking" may therefore carry a different meaning in another provision in the Act. This is illustrated by

s. 37(da) of the Act pursuant to which a mere possession of dangerous drugs can be presumed to amount to trafficking if the amount of drugs possessed exceed a certain specified amount in weight dependent on the nature of the drugs involved. Under this provision proof of possession is sufficient to constitute trafficking without the need to prove any further act as in the case of "trafficking" as defined in s. 2 of the Act. Even in the latter category there must be proof of possession in cases where it is a constituent element of the acts enumerated.

The critical matter for consideration, in the light of the submission advanced, is whether "trafficking" as defined in s. 2 of the Act can be proved with the aid of presumptions. A presumption, as I explained in *PP v. Chia Leong Foo* [2000] 6 MLJ 705, at p. 722:

> … is a statutory invention that upon proof of a fact, called a basic fact, an inference of another fact, called the presumed fact, can be drawn (see *PP v. Ooi Seng Huat* [1968] 2 MLJ 168). In truth, therefore, a presumption is a statutory direction as to the drawing of inferences. Thus it operates in place of evidence as it deems certain facts to have been proved (see *Ng Kim Huat v. PP* [1961] MLJ 308). Presumptions therefore do not deal with admissibility of evidence (see *PP v. Cheng Meng Bong & Ors* [1966] 1 MLJ 23) but with a special mode of proving facts which must otherwise be proved by evidence.

A presumption is therefore a recognised mode of proof of a fact. Section 2 of the Act merely defines, *inter alia*, "trafficking" and does not deal with proof of the elements that constitute the offence. The offence must be proved in accordance with the law laid down in the Evidence Act 1950 and the Act itself which by its s. 37 deals with presumptions. As the opening words of s. 37 of the Act stipulate that it applies to " … all proceedings under this Act … " clearly the section applies also to offences of trafficking as defined in s. 2 of the Act. The applicability of presumptions to prove trafficking is, of course, restricted to acts of trafficking that require proof of an element covered by a presumption. As I said earlier many of the acts of trafficking as defined in s. 2 of the Act require proof of the pre-requisite element of possession which is a matter covered by s. 37(d) of the Act. Thus learned counsel's argument that s. 37(d) of the Act involves a context of its own and is therefore inapplicable to s. 2 of the Act as the latter refers to acts in relation to dangerous drugs and not "anything whatsoever containing" dangerous drugs cannot be sustained. This overlooks the fact that an act of trafficking contemplated by s. 2 of the Act may involve possession. Thus where a person is carrying dangerous drugs in a container the act of carrying the container containing the dangerous drugs constitutes trafficking within the meaning of

s. 2 of the Act. This involves proof of the facts that the person was carrying the container and that he knew that the container contained dangerous drugs. The act of carrying the container is the *actus reus* that constitutes "trafficking" within the meaning of s. 2 of the Act. This must be proved by direct evidence as there are no presumptions in s. 37 of the Act to facilitate proof of that fact. In order to prove *mens rea* there must be evidence to show that the person knew what he was carrying. This can be proved by direct evidence as the circumstances of the case may reveal or with the aid of the presumption in s. 37(d) of the Act. The container that the person is carrying is "anything whatsoever containing any dangerous drugs … " within the meaning of s. 37(d) of the Act. The presumption is activated in respect of the contents of the container that is being carried and not the act of carrying the container itself. An appreciation of this distinction will show the fallacy of the argument advanced. It must, however, be reiterated that the presumptions contained in s. 37 of the Act, and in particular, s. 37(d) of the Act relate only to proof of possession. The further acts that constitute "trafficking" as defined in s. 2 of the Act must be proved by direct evidence. Accordingly, I expressed my disagreement with the submission advanced by learned counsel.

In order to prove the offence against the accused the prosecution must establish that the conduct of the accused falls within one of the acts as defined in s. 2 of the Act most of which, as I said earlier, involve the constituent element of possession. The offence may be proved by direct evidence or with the aid of presumptions. Where the possession is passive in the sense that it does not involve any of the acts specified in the definition of "trafficking" in s. 2 of the Act so as to amount to "trafficking" as defined, the prosecution may rely on the presumption contained in s. 37(da) of the Act to elevate such possession to "trafficking" subject to proof of the requirement of the weight of the drugs concerned as specified therein. It must be remembered that it is not permissible to pile the presumption of trafficking under s. 37(da) of the Act upon the presumption of possession under s. 37(d) of the Act (see *Muhammad bin Hassan v. PP* [1998] 2 CLJ 170).

The facts of this case reveal that when the accused was attempting to escape he was arrested. PW3 took possession of exh. P5 containing the dangerous drugs which the accused was holding. When PW4 instructed PW3 to arrest a male Malay who was walking towards the lift he did not say whether he saw the male Malay carrying anything. It cannot therefore be assumed that the accused was holding exh. P5 when he was walking towards the lift. The precise point of time and the manner in which the accused came to hold exh. P5 is thus not in evidence. However, the evidence adduced shows that

when the accused was arrested he was holding exh. P5. In his submission learned counsel contended that the act of holding dangerous drugs does not constitute "trafficking" within the meaning of s. 2 of the Act. He said that the acts enumerated in s. 2 of the Act refer to active conduct on the part of the accused and contemplate acts that go beyond mere passive possession of dangerous drugs. On the other hand the learned deputy public prosecutor contended that the word "hold" also means "carrying" or "keeping" as stipulated in s. 2 of the Act with the result that it constitutes trafficking. I agree with learned counsel that the acts that constitute trafficking as enumerated in s. 2 of the Act refer to some overt act that goes beyond mere passive possession. However, in view of the fact that the definition provided in s. 2 of the Act is not exhaustive as it only " … includes … " the acts enumerated therein, it is capable of including other acts not specified. Be that as it may, it is my view that the definition provision cannot be widely construed so as to include any conceivable act that may come within its ambit bearing in mind the rule that penal statutes must be construed strictly. Such a strict construction is necessary to ensure with certainty what acts or omissions are liable to be punished. As McLachlin J said in *R v. Kelly* [1992] 92 DLR (4th) 643 (SCC) at p. 667:

> It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the *maxin nullum crimen sine lege, nulla poena sine lege* – there must be no crime or punishment except in accordance with law which is fixed and certain.

This rule is particularly significant in a penal provision that attracts the death penalty as in this case. Thus in order for any other act to come within the definition in s. 2 of the Act it must be limited to the context of the scope of the acts enumerated in the definition section, that is to say, it must relate to an overt act which goes beyond passive possession. The "holding" of dangerous drugs as in this case can therefore constitute "trafficking" within the meaning of s. 2 in one of two ways. The act of "holding" the dangerous drugs must either be an act which goes beyond passive possession so as to constitute an additional act of trafficking under s. 2 of the Act or it must fall within the meaning of "carrying" or "keeping" as specified in the section. This requires a consideration of the meaning of the words "hold", "carry" and "keep". The *Websters' New World Dictionary* 3rd edn, defines the words as follows:

Hold

To take and keep with the hands or arms, or by other means; grasp; clutch; seize

Keep

to take care of, or have and take care or charge of; specif.; (a) to protect; guard; defend (b) to look after; watch over; tend

Carry

to hold or support while moving; to take from one place to another; transport, as in a vehicle; to hold, and direct the motion of; be a motion for; convey

To "hold" something merely means taking and keeping it in the hands or arms. To "keep" something goes one step beyond "holding" as it involves the further element of taking care of it. To "carry" something also goes one step beyond "holding" as it involves the further element of moving it. The "holding" of something is therefore the first step towards "carrying" or "keeping" it. As "carrying" and "keeping" involve further acts beyond "holding" it is my view that the holding of dangerous drugs does not amount to "carrying" or "keeping" them and is also not within the context of acts that constitute trafficking as defined in s. 2 of the Act so as to extend the definition to enable the inclusion of "holding" within its ambit. I pause to add that the act of "holding" can progress into "carrying" or "keeping" dependent on additional steps taken on the facts of a particular case. In that event it will constitute "trafficking" within the meaning of s. 2 of the Act. In this case the accused was arrested immediately after he attempted to run away and exh. P5 was seized from him. There was no evidence to show that the accused ran with exh. P5 in which event he can be said to be carrying it. There was also no evidence to show that the accused was holding exh. P5 for a period of time in which event he can be said to be keeping it. The available evidence only shows that the accused was holding exh. P5. He was therefore merely in passive possession of it. That, as I said earlier, does not amount to trafficking in the dangerous drugs within the meaning of s. 2 of the Act. However, such possession may be presumed to amount to trafficking pursuant to s. 37(da) of the Act subject to the restriction formulated in *Muhammad bin Hassan v. PP* [1998] 2 CLJ 170.

As the accused was attempting to escape with exh. P5 he was in custody and control of it. In order to establish possession the prosecution must also establish that the accused knew what he was carrying. If the prosecution had adduced evidence to show that he was holding exh. P5 for a considerable

period of time then that fact coupled with his attempt to escape may support the inference that he had knowledge of the contents of the exhibit. The arrest of the accused was sudden. In the circumstances the attempt by the accused to escape is not such a vital circumstance which can be considered to show that he was having any guilty mind (see *Bhagat Bahadur v. State* [1996] Cri LJ 2201; *PP v. Letchumanan* [2000] 4 CLJ 685). The prosecution must therefore rely on the presumption contained in s. 37(d) of the Act to establish that the accused knew that he was in possession of the dangerous drugs. In the circumstances the prosecution cannot avail itself of the further presumption contained in s. 37(da) of the Act to presume that the accused was trafficking in the dangerous drugs. Thus the evidence adduced by the prosecution only shows that the accused was in possession of the dangerous drugs. In fact learned counsel conceded that there is a case for possession of dangerous drugs under s. 6 of the Act. As he said in his submission:

> The prosecution has proven that the accused was in fact holding P5 in which the drugs were found. As such, the accused was in fact in control and had in his custody the package. As such the provisions of section 37(d) are attracted and the accused is deemed to have knowledge of the nature of the drugs in P5. The accused is therefore, and by operation of law, considered to be deemed in possession of cannabis.

However, learned counsel submitted that the punishable section should be s. 6 of the Act based on his submission on the weight of the dangerous drugs. I did not agree with this part of his submission in view of my ruling on the objection relating to the weight of the dangerous drugs. Accordingly I amended the charge to one of possession of the dangerous drugs under s. 6 of the Act and punishable under s. 39(A)(2) of the Act. The accused claimed trial to the amended charge and when the three alternatives were explained to him he elected to remain silent. At this stage learned counsel made a further submission which was a repetition of what he had submitted earlier. I then found the accused guilty of the amended charge.

In his plea in mitigation learned counsel merely said that the accused is aged 27 and is unmarried. The learned deputy public prosecutor informed the court that the accused had no previous convictions and prayed for an appropriate sentence as the weight of drugs involved in this case is about 20 times more than the prescribed limit. It is settled law that any sentence to be passed must be a balance between the public interest to be served and the interests of the person to be sentenced. The manner in which public interest is affected by drug abuse has been appropriately dealt with in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256. The position is the same, if not worse, today (see *Ang Chai Seng*

v. PP [2000] 1 CLJ 213). The seriousness of the drug menace must therefore be reflected in the sentence to be passed so that the requirements of public interest can be served effectively. At the same time it must be realised that the proper sentence for each drug offence depends on its own peculiar circumstances. It has been held that the weight of the drugs found on a person plays a significant role in assessing the appropriate sentence (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441. In this regard I refer to *PP v. Tia Ah Leng* [2000] 5 MLJ 401 where I had the occasion to say at p. 412:

> As the penalties for drug offences under the Act vary dependent on the weight of drugs involved the imposition of the maximum sentence in a particular case will be guided by the weight though it cannot be the yardstick in all cases. In saying this I refer to *R v. Laurentiu and Bechru* [1992] 63 A Crim R 402 where Wood J observed that it is not entirely appropriate to place too much emphasis on the precise quantity of the drug involved, because in some cases the possession relates to that of an intermediary or principal in the course of an enterprise that is judged particularly criminal, whereas in other cases the possession may be that of the end user. Be that as it may, I must immediately observe that these mitigating circumstances may be displaced in a particular case where the quantity of drugs involved is large. This is because quantity can in fact supply evidence of motive (personal need versus greed), degree of involvement, and potential for damage to community as well as being an indicator of the gravity of the offence (see *Sentencing: State and Federal Law in Australia* 2nd Ed by Fox and Freiberg p 1009). A claim of possession for mere personal consumption may also be not sustainable if the street value of the drugs is disproportionate to the financial standing of an accused. The mitigating effect of merely being an intermediary may also be weakened if the quantity of drugs is large thereby indicating active involvement in the enterprise. The absence of any of these circumstances in favour of an accused would be an indication of his heinous intention and thereby militate against innocent possession with the result that the imposition of the maximum sentence may be justified.

The plea in mitigation of the accused consisted of a mere statement of his age and marital status. He did not give evidence so as to enable the court to ascertain the role he played in being found in possession of the dangerous drugs. Neither did he state anything to that effect in his plea in mitigation. The weight of the dangerous drugs involved does not support the inference that he kept them for his own consumption. In the circumstances, bearing in mind the principles of sentencing that I have referred to and the fact that the accused is a first offender I convicted him and imposed a sentence of ten years' imprisonment and ten strokes of the rotan.